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No. 95-167

In The

Supreme Court of the United States

October Term, 1995

THOMAS S. WALDRON,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

REPLY BRIEF FOR PETITIONER

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ARGUMENT

I.

THE GOVERNMENT'S PROPOSED CONSTRUCTION OF 18 U.S.C. § 1014 CONFLICTS WITH CIRCUIT PRECEDENT, AND INDEPENDENTLY REQUIRES A GRANT OF CERTIORARI TO RESOLVE AN IMPORTANT QUESTION OF FEDERAL CRIMINAL LAW

The Government acknowledges that in every circuit court of appeals save one, a defendant is entitled to a jury instruction that materiality is an element of the Government's proof in a § 1014 prosecution.[1] *See* Petitioner's Supplemental Brief and cases cited therein; *see also* Brief in Opp. 6, n. 4. Thus, after *United States v. Gaudin*, 115 S. Ct. 2310 (1995), the element of materiality in such cases will be submitted to the jury, not decided by the court. Nevertheless, the Government disregards those circuit precedents, and contends that although materiality was not submitted to Waldron's jury, he is not entitled to review of his conviction because "materiality is not an element of Section 1014." Brief in Opp. 4.

This Court should grant certiorari, because if the Government is correct, ten circuits are wrong. If the Government is wrong, it should not be advocating an erroneous position to sustain Waldron's conviction. If the essential elements of a federal crime can vary from circuit to circuit, or if the Government persists in advocating a position contrary to

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1. The single contrary decision is *United States v. Cleary*, 565 F.2d 43, 46 (2d Cir. 1977). The Government's offer of *Kay v. United States*, 303 U.S. 1 (1938), does not undermine the majority circuit construction of 18 U.S.C. § 1014. *Kay* made clear that "actual damage is not an ingredient of the [12 U.S.C. § 1467] offense." *Id.* at 4. It did not determine the essential elements of a crime not then created by Congress — 18 U.S.C. § 1014.

established circuit precedents, this Court should resolve the question.

The Government acknowledges that following *Gaudin*, the Eighth and Ninth Circuits recently "reversed convictions under Section 1014 where the issue of materiality had not been sent to the jury." Brief in Opp. 7, n. 4 The Government is going to seek *en banc* review of those decisions. *Id.* Plenary review of this case would obviate the necessity of numerous courts of appeals' trying to reconcile the Government's Section 1014 construct with prior circuit precedents, and with *Gaudin*. At the least, a grant of certiorari and a remand to the Fifth Circuit would provide Waldron with an equal appellate opportunity to have judicial review of his conviction in light of *Gaudin*. *Compare, Kapoor v. United States*, 54 F.3d 765 (table), *cert. granted*, __ U.S. __, 1995 WL 334929 (No. 94-1926) (Oct. 2, 1995) (vacating perjury judgment, remanding to Second Circuit for reconsideration in light of *Gaudin*).If the Fifth Circuit's decision is allowed to stand, this conviction will be out of synch with others presenting similar issues, and this Court's promise in *Griffith v. Kentucky*, 479 U.S. 314, 328 (1987) ("We therefore hold that a new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases, state or federal, pending on direct review, or not yet final, with no exception. . . ."), will be unfulfilled.

II.

THE QUESTION LEFT OPEN IN *GAUDIN* AND RAISED HERE BY THE GOVERNMENT — WHETHER PLAIN ERROR ANALYSIS APPLIES — WARRANTS A GRANT OF CERTIORARI

The Government's opposition to review in this case admits that "the conflict among the courts of appeals as to whether

materiality is an element of Section 1014 might warrant review in a proper case. . ." (Brief in Opp. 8), but claims that Waldron's failure to object at trial makes this only a "plain error case."[2]

That argument collides with post-*Gaudin* decisions of the lower courts, and anticipates the plain error and harmless error questions left open in *Gaudin* (115 S.Ct. at 2321-22, Rehnquist, C.J., O'Connor, and Breyer, JJ., concurring), thus presenting additional reasons for this Court to grant review. Subsequent to Petitioner's Supplemental Brief, another post-*Gaudin* court has found that the failure to submit the essential element of materiality to a jury requires a new trial, without resort to plain error analysis. *United States v. Pearson*, __ F.Supp. __, 1995 WL 541716 (C.D. Ill. 1995) (18 U.S.C. § 1623 perjury conviction). The Ninth Circuit has found plain error analysis applicable, but satisfied, in a *Gaudin* error situation. *United States v. Nash*, __ F.3d __, 1995 WL 500653 (9th Cir. 1995).

In *Pearson*, the court concluded that a pre-*Gaudin* objection to the "materiality is a matter of law" instruction would have been "a waste of time" given circuit precedent, and that despite the failure to object, the instruction given required reversal, not a plain error analysis:

> In short, the plain error doctrine is not applicable in the instant case. Why? Because there was no error at trial. As all parties have conceded, at the time of the trial, the law in the Seventh Circuit was "well settled;" materiality was a question of law for the court to decide. *Watson*, 623 F.2d at 1201. As noted

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2. The Government does not dispute that Waldron's appeal anticipated the *Gaudin* rule. As set forth in the petition for certiorari, during the pendency of *Gaudin*, Waldron raised it in his Fifth Circuit brief, at oral argument, post argument, and in a motion for bond pending certiorari review.

by the Supreme Court, a court cannot review for plain error unless there is first an error. *Gaudin*, at *40 (citing, *United States v. Olano*, 113 S.Ct. 1770 (1993)). Thus, since there was no error at trial, the plain error doctrine is obviously not applicable.

Indeed, the issue before the Court is much simpler. As a result of the retroactive application of *Gaudin*, Scott is entitled to a new trial. It is that simple.

* * *

Perhaps we can make this issue even more clear. A prerequisite to the application of the plain error doctrine is a failure to object at trial. *United States v. Lakich*, 23 F.3d 1203, 1207 (7th Cir. 1994). Here, the law was clear in the Seventh Circuit, i.e., materiality was a question of law for the court. So how can Scott be faulted for not objecting to the materiality issue at trial? What could he have possibly objected to? Since the law was clear in this circuit prior to *Gaudin*, Scott's sole argument in support of such an objection would have been to ask the district court to overrule the "well settled" law in the Seventh Circuit. Obviously, an argument of this nature would have been a waste of everyone's time.

The Ninth Circuit in *Nash* reached the same result — a new trial — through a different route. First, the court reaffirmed that materiality is an essential element of 18 U.S.C. § 1014. 1995 WL 500653 at *2. Then, noting that an earlier panel had found the

error in *Gaudin* to be "structural and plain," *id.* at *3, the Ninth Circuit found that a *Gaudin* "materiality" error in a § 1014 prosecution satisfied the plain error standard, and reversed the § 1014 convictions.[3]

If *Pearson* is right, or if *Nash* is right, or if plain error does not apply to a *Gaudin* case in which the jury has been precluded from deciding an essential element of a crime, then Waldron's conviction cannot be sustained. The Government seeks to avoid that result by suggesting that Waldron's counsel "agreed that materiality was a determination for the court." Brief in Opp. 3. But the words of trial counsel, quoted by both Petitioner and the Government (Pet. Cert. 7, n. 1; Brief in Opp. 3, n. 1), evidence his recognition of the governing precedent, and his attempt to avoid the prejudice of having a jury told that the judge had decided an essential element against Waldron. That was not acquiescence, but an attempt to avoid the effects of the pre-*Gaudin* state of the law.

The Government's speculation about how the jury could have perceived Waldron's alleged false statements (Brief in Opp. 8-9) is a premature "harmless error" analysis. Whether harmless error applies at all is an important question left unanswered in *Gaudin*. 115 S.Ct. at 2321-22 (Rehnquist, C.J., and O'Connor and Breyer, JJ., concurring). If harmless error does not apply, the Government's view of the jury's thought processes is irrelevant. If harmless error applies, review of the whole record is required, including Waldron's evidence that the *de minimis* environmental dispute, and deeds which had no legal import, were not material. Pet. Cert. 4-5. A court, not the Government, should decide

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3. *But see United States v. Keys*, __ F.3d __, 1995 WL 574226 (9th Cir. Sept. 29, 1995) (analyzing claim of *Gaudin* error in a § 1623 perjury case, finding it to be plain error under *Olano*, but exercising discretion not to reverse, because, *inter alia*, the error was "invited" and the case "did not present a 'serious factual question' regarding the omitted element").

whether Waldron's conviction was a "miscarriage of justice." Brief in Opp. 9.

Whether *Gaudin* merits reversal of Waldron's convictions is properly before this Court for plenary review, or for remand to the Fifth Circuit to consider the effect of the June 19, 1995 *Gaudin* decision on Waldron's May 18, 1995 conviction affirmance.

CONCLUSION

Certiorari should be granted. Either plenary review, or a remand in light of *Gaudin*, should be accorded.

Respectfully submitted,

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